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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, et al.,
*Appellants,*

*vs.*

RAY S. RILEY, as State Controller of the State of California,
*Appellee.*

## BRIEF OF APPELLANTS

### Statement.

The bill of complaint shows:

The plaintiffs instituted the action as a class suit. (R. 2.)

I.

The defendant is the State Controller. (R. 2.)

II.

Congress on July 11, 1916, duly enacted the Post Road Act to aid the States in the construction of rural post roads. Chap. 241, 39 Stat. at line 355. (R. 2.)

The State enacted a law in 1917, in order to receive aid by which the State assented and agreed to abide by all the provisions of said Federal Act. Chap. 29, Laws of 1917. (R. 2.)

Congress on November 9, 1921, amended and supplemented the Post Road by the *"Federal Highway Act."* Chap. 119, 42 Stat. at line 212. (R. 3.) Said Federal Acts provide:

> "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds." (R. 3.)

Again:

> "The term 'Construction' means the supervising, inspecting, actual building, and all expense incidental to the construction of highway, except locating, surveying, mapping, and costs of rights of way." (R. 3.)

Again:

> "The term 'Reconstruction' means a widening or a rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs." (R. 3.)

The Federal moneys could be used only for construction or reconstruction, but the State must, at its own cost, maintain and repair the highways and failing so to do, the Secretary of Agriculture shall proceed to maintain and repair said highways and charge the cost against the Federal fund allotted to said State. (R. 3)

The Federal Government has paid over to the State many millions of dollars and will in the future pay many additional millions of dollars to said State under the provisions of said Federal Acts so adopted by the State. (R. 3, 4.)

That all the highways of the State are post roads, and

the public highways of the State are covered by the said provisions of said Federal Acts. (R. 4.)

III.

The State Constitution provides that neither the legislature nor any officer can appropriate or draw any money from the State Treasury for the purpose or benefit of any corporation, etc.; every act shall embrace but one subject, which shall be expressed in its title; the legislature has no power to pass local or special laws: for the assessment or collection of taxes, refunding moneys paid into the State Treasury, granting to any corporation, association, or individual any special right, privilege or immunity, or exempt property from taxation; the legislature has no power to give or to lend, or to authorize the giving or lending, of credit of the State in aid of or to any person, association, or corporation, nor shall it have power to make any gift of any public money or thing of value to any individual, etc., whatsoever. (R. 4, 5.)

IV.

The State in 1923 enacted a law entitled:

> "An Act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said Act, and repealing all acts and parts of acts inconsistent herewith." Chap. 267, *Laws 1923.* (R. 5.)

The State amended said law in some respect by Chap. 359, *Laws 1925,* and Chap. 716, *Laws 1927.* (R. 5.)

In the year 1927, the state amended said law by add-

ing one cent to the two cents per gallon. Chap. 795, *Laws of 1927.* (R. 5, 6.)

The State Court has declared the meaning and purpose of said Motor Vehicle Fuel Law of said Chap. 267, *Laws 1923,* as amended aforesaid. (R. 6.) The said *Law of 1923* was construed with the Motor Vehicle Law so as to raise revenue in the nature of compensation for the damage done to the highways by motor propelled vehicles; that by reason of the provisions granting refunds, the plaintiffs and all others similarly interested or situated must pay in advance said exactions, solely in order to use their motor propelled vehicles on the public highways, and said exactions are "tolls" for such use; the distributors do not pay a cent, but collect from all the consumers of motor vehicle fuels; the distributors keep one per cent of all moneys so collected and do not pay over to said defendant the entire amount so collected and said one per cent is a gift; said distributors enjoy the benefit of the use of the moneys collected during the said periods plus an additional 45 days, and said distributors have received such benefits from said collections from all consumers; the defendant has and will in the future pay over to said distributors and consumers exempted by said law, as amended, as refunds, many hundred of thousands of dollars at a loss of one per cent as aforesaid, as he has only received 99% of the monies so collected, not only from the plaintiffs and other similarly interested or situated, but also from the exempted consumers, and such procedure benefits the distributors and exempted consumers; the moneys received from the defendant are divided between the State and the counties, and no portion thereof is paid over to the municipalities, but they

must maintain, repair, construct or reconstruct the streets by moneys from taxes and assessments and all of said moneys so received by defendant are used for the sole purpose of constructing or reconstructing, maintaining and repairing the highways outside of the limits of said municipalities. (R. 6, 7.)

V.

The plaintiffs, as well as others similarly interested or situated, are taxpayers and have and are now operating motor vehicles on the highways and must pay in advance for said motor vehicle fuel before so operating on said Federal aided highways or on the streets of municipalities, and said exactions are not a part of the price of said fuel, but in addition to the purchase price. (R. 7.)

Such exactions are "tolls" and the cost per mile of said use depends upon the size and weight of said vehicles; the plaintiffs, as fell as said others, have been compelled to pay and will be compelled to pay taxes and assessments for the construction, reconstruction, maintenance and repair of the streets of the municipalities, and that about 40% of all moneys so received by the defendant is a charge for the use of public highways outside of said municipalities, and the other 60% is a charge for the use of streets within said municipalities, although neither the municipalities nor the plaintiffs, as well as said others, as taxpayers receive any benefits whatsoever from such exactions and payments. (R. 7, 8.)

VI.

The defendant, solely under color of his office, has in the past and will in the future continue to demand and collect said illegal exactions under the provisions of said

State laws; such collections amount to many thousands of dollars daily; the defendant has received the tax roll and has demanded about $8,477,293.00 during the period from March 31, 1928, to July 1, 1928, and the defendant has paid out during the same period about $800,000.00, as refunds under said State laws. (R. 8.)

Defendant will immediately distribute the money, as provided by said State laws, and no portion thereof will be distributed or apportioned to said municipalities. (R. 8.)

That said illegal acts of the defendant, acting under said unconstitutional laws, have and will continue to obstruct, hinder, impair and impede the unrestricted and vested passage, use and operation of said motor vehicles on said Federal aided highways, and the streets within the limits of said municipalities, to the irreparable loss, damage and injury to said plaintiffs and all said others, unless the defendant is restrained by the Court. (R. 8, 9.)

VII.

The provisions of said unconstitutional State laws, to-wit, Chapter 267, *Laws 1923,* Chapter 359, *Laws 1925,* Chapters 716, 795, *Laws of 1927,* and the said illegal acts of said defendant in enforcing said State laws, were and are void and unconstitutional, being contrary to and in violation of the Federal Constitution, especially the Fourteenth Amendment thereof, the *"Federal Highway Act,"* being Chapter 241, 39 Stat. at line 355, and Chapter 119, 42 Stat. at line 212, as adopted by the State, being Chapter 29, *Laws of 1917,* and further contrary to and in violation of the State Constitution, the protection

of all of which the plaintiffs, as well as said others, pray. (R. 9.)

VIII.

No plain, adequate and complete remedy at law. (R. 9.)

IX.

The value involved exceeds $3,000, exclusive of interest and costs. (R. 9.)

X.

The plaintiffs, on behalf of themselves as well as others similarly interested or situated, prayed for a temporary injunction enjoining defendant, as State Controller, from in any way or manner disbursing, using, apportioning or expending any of the moneys which have been or will be received by him as collections from March 31, 1928, and he is directed and commanded to safeguard and keep intact all moneys from said collections after March 31, 1928, so as to satisfy any final decree, and they prayed for a hearing and determination of said motion for a temporary injunction before three judges, one of whom to be a Circuit Judge, and said Statutory Court shall upon the final hearing enter a decree declaring the said State laws, being Chapter 267, *Laws of 1923,* Chapter 359, *Laws of 1925,* and Chapters 716 and 795, *Laws of 1927,* are void and unconstitional, and that the defendant, as State Controller, be forever enjoined and permanently restrained from enforcing the said illegal, void and unconstitutional State laws, and further said defendant to immediately pay over to the registry of the Court all of the moneys which he has received under the provisions of said illegal, void

and unstitutional State laws since March 31, 1928, and for such allowances, distributions and payments as may be hereafter awarded by the Court, and for all other proper and further relief as may be just and equitable in the premises, and for the costs and disbursement. (R. 10, 11.)

The plaintiff, Geo. B. Williams, verified the bill of complaint. (R. 11)

### Motion for Interlocutory Injunction

Motion for Interlocutory Injunction until the final determination of the cause; requested a Statutory Court to hear said motion, and pass on it, and also to finally hear and determine said action.

The motion was based upon the records and files and the affidavit attached to motion. (R. 11.)

### Affidavit

Finn, one of the plaintiffs, is the owner and operator of motor vehicles, using the highways and the streets within the limits of municipalities; he is the owner of real estate in the City of Los Angeles, and has paid real and personal taxes in said city; he charges on information that the streets in said city are maintained and repaired by said taxes, and the exactions under said State laws do not furnish any funds to maintain or repair the streets of any municipalities, as the proceeds thereof are divided by the State and the counties; that the defendant had paid out money for refunds after the period in which he has received said collections; the defendant will disburse and turn over to the fund created by the law, and he will lose control and possession of

said moneys which he will collect since the 31st of March, 1928, unless enjoined by the Court; the affiant, as well as said others, will not be able to recover back said moneys, if the defendant loses the control and possession of said moneys, and they will be irreparably damaged and their moneys lost. (R. 12.)

**Motion to Dismiss Bill of Complaint**

The defendant was represented by his solicitors, U. S. Webb, Attorney-General, and Frank Q. Guerena, Deputy Attorney-General. The said motion contains six paragraphs. (R. 14, 15.)

**Order Denying Interlocutory Injunction and Dismissing Bill of Complaint.**

Short order denying the motion for an Interlocutory Injunction and granted the motion to dismiss the Bill of Complaint. (R. 16.)

No opinion served or filed.

Petition for Appeal with Assignment of Errors.

Allowance of Appeal. (R. 17, 18.)

**Specification of Errors**

I.

The lower Court erred in denying the motion for a temporary injunction.

II.

The lower Court erred in granting the motion to dismiss the bill of complaint.

III.

The lower Court erred in failing and refusing the plaintiffs and all persons, firms, associations and corpo-

rations similarly interested or situated the protection of the Federal aid legislation, especially the prohibition against "tolls of all kinds," and the contract so adopted by the State.

IV.

The lower Court erred in permitting the defendant to enforce the provisions of said unconstitutional State laws, requiring the plaintiffs and all others similarly interested or situated to pay the said exactions contrary to and in violation of the Federal aid legislation, prohibiting "tolls" of all kinds and the contract so adopted by the State, the protection of which the plaintiffs and said others prayed.

V.

The lower Court erred in refusing to decide that said State laws compelling the plaintiffs and all said others to pay three cents on every gallon of said motor fuel and the acts of the defendant thereunder enforcing said exactions were "tolls" and were illegal, void and unconstitutional, being contrary to and in violation of the Federal aid legislation, and the contract intered into by the State in which it agreed not to levy any kind of toll for the use of said highways.

VI.

The lower Court erred in refusing to decide that said motor vehicle fuel laws of the State and the acts of the defendant in enforcing the said unconstitutional laws were illegal, void and unconstitutional, being contrary to and in violation of the provisions of the Fourteenth Amendment of the Federal Constitution, prohibiting the making or enforcement of any law which shall abridge the privilege or immunities of a citizen, or which shall

deprive any person of life, liberty or property without due process of law or deny to any person the equal protection of the laws, and the plaintiffs and all persons, firms, associations and corporations, prayed protection under said provisions of said Fourteenth Amendment.

VII.

The lower Court erred in refusing to decide that said motor vehicle fuel laws of the State and the acts of defendant in enforcing the said unconstitutional laws were illegal, void and unconstitutional, being contrary to and in violation of the provisions of the Constitution of the State of California, relating to titles of acts, prohibiting gifts, privileges and immunities, refunds, person's life, liberty or property without due process of law or denying the equal protection of the laws, and said plaintiffs and said others prayed protection under said provisions of said State Constitution.

VIII.

The lower Court erred in refusing and failing to file a written opinion in denying said motion for a temporary injunction and granting the motion to dismiss the bill of complaint, although at the hearing the plaintiffs requested the Court so to do.

## ARGUMENT

### I.

**The Supreme Court of California has interpreted the provisions of Chapter 267, Laws of 1923, and declared that the sole object or purpose thereof was to exact license taxes for motor vehicles operated over the public highways, so as to raise funds with which such highways may be improved and kept in repair. And that such exaction is imposed exclusively upon the owners or operators using the highways by their motor vehicles.**

In delivering the opinion of the Court, Judge Hart said:

> "Of course, the purpose of the legislation exacting license taxes for motor vehicles operated over the public highways is to raise funds with which such highways may be improved and kept in repair in such manner as suitable to the mode of transportation peculiar to motor vehicles. The theory of such a tax, particularly under present-day conditions as the character of the highways required and the great expense in constructing and maintaining them, is, manifestly, that it is only just and proper that those who use the public highways either for business purposes or for pleasure should bear the expense of keeping in repair those already improved * * *
>
> and to contribute to the construction of new reads. * * *, the burden thus imposed upon motor vehicles or the owners and operators thereof, considering, of course, the particular use to which such vehicles are put, their weight, and such other elements as might properly enter into determination of the probable effect, as to the matter of 'wear and tear,' the use of each of the various classes the various vehicles would have upon the roads. * *.
>
> "The expense of maintaining the public highways from the greatly increased use and consequently wear and tear to which thus the highways now are

and have been subjected, has of necessity proportionately been increased, and, must naturally, if, * * * the greatly enhanced cost of improving and keeping in proper repair the highways * * *, in bearing the burden necessarily coincident with the work of improving and maintaining the public highways * * *.

"It is true that the license tax of 2 cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles; yet that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of 2 cents on every gallon of gas that they purchased for use in propelling motor vehicles is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes against the goods and wares of the vendor thereof and by him paid are always included in so-called 'overhead expenses,' and, of course, constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer; * * * * * * * * "the legislature of 1923 passed an act establishing an entirely new system for the raising of revenues for said purpose, so far as gas and other fuel cars are concerned, by requiring, practically, the owners or operators of all such cars to pay to the State, in addition to nominal registration fees, two cents per gallon for all gas consumed in the operation thereof. (Stats. 1923, p. 571.)

"The first section of the act defines the meaning of a number of the terms used in the statutes, * * the second section provides that every distributor, etc., of fuel gas, so engaged when the act goes into effect, and any person, etc., intending thereafter to become such distributor, etc., shall within a specified time register as such distributor with the State Board of Equalization, whereupon said Board shall issue to such distributor a license, etc. Section 3 fixes a tax of two cents per gallon of fuel gas sold

to every owner or operator of fuel gas motor vehicles and provides that the payment thereof shall be to the State Controller, in quarterly installments. Section 6 provides that, within a certain period of time, specified therein, every distributor of gas fuel, shall file with the State Board of Equalization, within twenty days after the end of each quarter, a verified statement in a certain prescribed form, showing, among other things, the total number of gallons of motor vehicle fuel, etc., sold and distributed within the state by such distributor. Failure by any distributor to file such statement entails, by virtue of the provisions of Section 8, a certain penalty. * * *

"The eleventh section provides that any person, firm, corporation, etc., who shall buy motor vehicle fuel for purposes other than in motor vehicles operated or intended to be operated upon public highways, and also those buying such gas to be used and used exclusively in motor vehicles employed in the transportation of rural free delivery mails, shall be reimbursed by the State in the amount of the tax on fuel gas as provided by said Act, upon presenting to the State controller, in the form prescribed, a claim for the total amount so paid, all applications for such reimbursements to be filed with the controller within six months from the date of the purchase of such motor vehicles fuel. * * *.

"Section 12 vests the State Board of Equalization with the right to make such examinations of the records of distributors as it may deem necessary for the carrying out of the provisions of the Act.

"Section 13 provides that all license taxes collected by the State controller in pursuance of the provisions of said Act shall be by that officer deposited in the State treasury and credited to the 'motor vehicle fund,' which the Act expressly creates, and further provides that one-half of the net amount of all the moneys so received shall be paid to the counties of the State in certain designated proportions and the same placed in 'a special road improvement fund,' and to be expended by the coun-

ties receiving them 'exclusively in the construction and maintenance of roads, bridges, and culverts in each such county.' The moneys remaining after the payment of the amount above indicated to the counties are appropriated by the Act (Section 12), to the 'State highway maintenance fund,' to be used exclusively in the maintenance, repair, re-construction, etc., of state highways, and roads and highways in state parks. * * *.

"At the same session of the legislature at which the Act above considered was passed, the Act containing the provision (Section 77) * * * was passed. * * * [2] The attorney-general, representing the respondents, insists that * * * the two Statutes of 1923—the one dealing with automotive highway traffic and other matters pertaining to the use of motor vehicles, and the other levying a fuel gas tax of two cents per gallon, to be paid by all persons operating by gas—must be read, and considered together as being *in pari materia*. This position is vigorously assailed by counsel for the petitioners * * * and the two acts in that particular *are in pari materia;* that they constitute one law."

*Old Homestead Bakery v. Marsh*, 75 Cal. App., 247, 242 Pac. 749;

This case was affirmed by the Supreme Court on January 24, 1926.

The respondent's attorney was Attorney-General U. S. Webb.

It is seen that all consumers must and do, pay in advance two cents per gallon of said motor fuel to the distributors as tax collectors, and those consumers or distributors who do not use the public highways or are exempt, collect back from the State Controller, said two cents, although said State Controller only received from said tax collectors, distributors, 99 per cent of said two cents, and thus the remaining consumers, to-wit: the

plaintiffs and all persons, firms, associations and corporations, similarly interested or situated, not only are charged for the use of the highways, but also to pay the said one per cent lost between the distributors, tax collectors and the State Controller. Said Act, chapter 267, Laws of 1923, has been amended in 1925, and 1927, but such amendments do not change or effect the said opinion aforesaid.

II.

**The Interpretation of the Meaning of said State Laws is binding upon the Federal Court, but it is the duty of this Court to determine whether such State Court's interpretation is in violation of the Federal Constitution, or not.**

The Supreme Court has lately re-affirmed this doctrine, in delivering the opinion. Mr. Chief Justice Taft said:

> "It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this court in St. Louis Southwestern R. Co. v. Arkansas, 235 U. S., 350, at page 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:
>
> "Upon the mere question of construction we are, of course, concluded by the decision of the State Court of Last Resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which

the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State." Hanover F. Ins. Co. v. Carr., 272 U. S., 179, 71 L. Ed. 224.

III.

**The said motor vehicle fuel exactions are "tolls," being charges collected, in advance, solely for the use of highways by motor vehicles.**

It is admitted that the appellants, as many thousands of persons, firms, associations and corporations, have and now are compelled to pay in advance said motor vehicle fuel exactions, before they can use the public highways, including the streets of municipalities by their motor vehicles and said exactions are in addition to the purchase price—( R. 6, 7, 8); that the moneys so collected must be divided between the State and the counties and used exclusively to maintain, repair or construct or reconstruct, highways outside of the limits of municipalities. (R. 7.)

The said California Courts announced that said exactions, charging the use of public highways solely by motor vehicles, were to create a fund to improve and maintain the public highways and all the moneys, so collected, only improve and maintain the public highways outside of the limits of municipalities.

These exactions are revenue measures and do not come within the police power of the State.

*In the matter of Schuler*, 167 Cal. 282, 139 Pac. 685. the said Court based its decision on the case of *Ft. Smith v. Scruggs*, 70 Ark. 549, 69 S. W. 679, also the case of

*Kane v. State,* 81 N. J. S. 594, 80 Atl. 453, and other decisions.

Arkansas Supreme Court in the opinion, Judge Riddick said:

> "The license fee imposed is, then not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed." Ft. Smith v. Scruggs, 70 Ark. 549, 69 S. W. 679.

Again in opinion in the *Kane v. State,* is found:

> "A state may do these things because, having expended moneys, either itself or by the agencies created by it, in increasing the facilities which commerce, either interstate or intrastate, may be carried on, it is entitled to charge a fair remuneration for the outlay may by it, and for the maintenance of the public works it has constructed.
>
> "A very ordinary example of the exercises of this power is the construction of public roads known as 'turnpikes' by agencies created by the state, for the use of which tolls are permitted to be charged to persons using the same. Such public roads are open to the use of every person desiring to travel upon them upon payment of the tolls authorized to be charged.
>
> "Although, ordinarily, turnpikes are built and owned by corporations created by the State, for the purpose of constructing and maintaining them, what the state may do indirectly through such agencies it may do directly; that is, it may itself lay out and construct such improved public roads, and charge reasonable tolls to all persons using the same, without regard to the character of the business for which they are being used. And this is practically what New Jersey is now doing."
>
> *Kane v. State,* 81, N. J. L. 594, 80 Atl. 453.

The Supreme Court of the United States affirmed the judgment of the New Jersey Court that registration fees were exacted as "tolls."

*Kane v. New Jersey,* 248 U. S. 160, 61 L. Ed. 222.

In the decision of the New Jersey Court certain cases were cited upon which the decision rested.

One case cited was *Sands v. Manistee River Improvement Co.,* 193 U. S. 288, 31 L. Ed. 149, in which case the following appears in the opinion:

> "There is no analogy between the imposition of taxes and the levying of tolls for improvement of highways; and any attempt to justify or condemn proceedings in the one case, by reference to those in the other, must be misleading. Taxes are levied for the support of the government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield. * *
>
> "And to meet the cost of such improvement, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. Huse v. Glover, 119 U. S., 543, 548 (30: 467)."

Again Mr. Justice McReynolds in delivering the opinion said:

> "In view of the many decisions of this Court there can be no doubt that where a State at its own expense, furnishes special facilities for the use of

those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

*Hendrick v. Maryland,* 235 U. S. 610, 59 L. Ed. 385.

Again Mr. Justice Hughes said in delivering the opinion:

"While the State may not impose a duty of tonnage (citing cases), it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority."

*Simpson v. Shepard* (Minnesota Rate Cases), 230 U. S. 352, 405, 57 L. Ed. 1511, 1544.

Both Hendrick and Kane were non-residents of Maryland and New Jersey, and desired to pass through the said States, using the public highways by their motor vehicles. They refused to comply with the Motor Vehicles Acts, and relied upon the Commerce Clause prohibiting the States from exacting a duty, impost or tonnage charge. This Court re-affirmed the doctrine that such charges were not duties, imposts or tonnage charges, but tolls, and the States had the right to charge reasonable tolls for the use of highways by motor vehicles.

The Justices of New Hampshire tendered an opinion that the proposed motor vehicle fuel law was legal, if the charge was a "toll."

An excerpt from such opinion follows:

"A tax levied upon the privilege of selling gasoline is clearly outside the power to levy 'proportional and reasonable assessments, rates and taxes.' * * * But your inquiry seems to suggest that what is intended is not the levying of a tax, but rather the purpose in view is to fix a charge, or toll, for the use of the public highways of the state. It is within the legislative power to provide

that all highways, or any specific highways, shall be toll roads, and open to travel only upon the payment of a specified charge. (Citing the case of Kane v. State that the charge for the use of public roads by automobiles is a toll.)

"Many instances might be cited where governmental undertakings are supported in whole or in part by charges made upon those who avail themselves of the advantages afforded thereby. Waterworks, sewers, wharves, locks and canals are often maintained in this manner. Charges made in this way are not taxes. (Citing Sands v. Manistee, showing that a charge for artificial improvements is a toll.)

"Tolls that are reasonable in amount, and not discriminatory, have uniformly been upheld. Constitutional limitations upon the taxing power have no application to such levy. (Citing a large number of cases.)

"It is a matter of common knowledge that since the advent of the use of automotive vehicles upon highways large sums have been expended in making the conditions more favorable for that class of travel. No reason appears why the Legislature may not impose upon those who accept the benefits of such highway improvement and maintenance a reasonable charge for the use made. It is upon this ground that the state registration systems for automobiles have been sustained. The purpose of these laws is 'to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.' Hendrick v. Maryland, supra, 235 U. S. 622, 35 Sup. Ct. 142, 49 L. Ed. 385. * * *

"The charge can not be imposed upon sales of gasoline, generally, but only when the commodity is sold for consumption in the operation of vehicles upon the highways. A charge so limited amounts to the same thing, in substance, as a toll for the

use of the highways, and may lawfully be imposed by the Legislature."

*In Re Ops* (N. H.), 81 N. H., 552, 120 Atl. 629.

The State of New Hampshire enacted the law in 1923 with the following title:

"An Act to provide for a road toll and to amend the *Laws of 1921,* Chapter 119, Section 25, relative to license fees on motor vehicles."

Chapter 75, *N. H. Laws of 1923.*

This law was amended by Chapter 104, *Laws of 1926.* The law, as amended, provides in Sec. 4:

"Distributors pay to the State Treasurer a road toll of two cents per gallon, upon each gallon so reported, this being collected by the distributor from the dealer, and by the dealer from the consumers."

Sec. 7, Refunds if fuel is not used for the propulsion of motor vehicles upon highways—Moneys collected and used exclusively to maintain, repair and construct the public highways.

The Justices of Massachusetts rendered an opinion on a proposed license law. An excerpt of the opinion follows:

"In the early days of the commonwealth many, if not most of the highways were built and maintained by private enterprise through turnpike corporations established by law and dependent for their support upon tolls charged to travelers. Bridges were built and maintained in the same way. Ferries were operated either in the same way or by municipalities, which collected tolls for their use. All highways and bridges, so far as we are aware, and some of the ferries, have been acquired by the commonwealth, or by counties, cities or towns. * * * The free use of all highways has been provided at

the expense of the public treasury for many years in this commonwealth. This has not always been the custom. It is comparatively modern.

"(2) The power of government to take, acquire or construct instrumentalities for public travel to charge toll, rental or other recompense therefor is illustrated in several decisions. Commonwealth v. Wilkenson, 6 Pick. 175, 29 Am. Dec. 654; George G. Fox Co. v. Boston & Northern Street Railway, 217 Mass. 140, 142, 140 N. E. 356; Boston v. Treasurer and Receiver General, 237 Mass. 403, 414, 130 N. E. 390, and cases there reviewed.

"If and so far as such tolls or rentals are based upon fair recompense for initial construction and for adequate maintenance, they do not involve the power for taxation. The power proposed to be exercised in the present bill is not of that nature. Avowedly an excise tax is established. * * *

"Toll—at that time a word in common use in connection with turnpikes and bridges—thus was mentioned more than 100 years ago in the first decision requiring a critical consideration of the meaning of the word "commodities" in the Constitution as an illustration of an excise. * * *

" 'Toll' is the apt word to describe the collection of money for the use of a highway or bridge.

"(3, 4) There are appearances of inequality about a toll upon the use of highways by motor vehicles. The fact that no toll is charged for the use of highways by other kinds of vehicles bears a superficial likeness to discrimination against motor vehicles. It is a matter of common knowledge that the number of motor vehicles vastly exceed all others and that a different highway construction as to durability and smoothness is required for their convenience. * * *

"There is no general provision in the proposed bill for charging toll for motor vehicles owned by non-residents when used upon the highways of the commonwealth. That, too, may be found to be small in comparison with domestic use. * * *

"(5) A modern instance of the collection of toll

by way of excise tax is found in G. L. C. 63, Par. S. 62-66, for the operation of street railways in public ways. Collector of taxes against Bay State Street Railway, 235 Mass. 336, 125 N. E. 614. The collection of a tax levy by way of tollage or license for the use of public ways by motor vehicles has been upheld in other jurisdictions. (In support of such announcement, a large number of cases were cited, including Kane v. New Jersey, supra; Pierce Oil Corp. v. Hopkins, supra; Standard Oil Co. v. Brodie, supra; Hendrick v. Maryland, supra; in re Ops. of the Justices of New Hampshire, supra.)

* * *

"As a matter of abstract principle we are of opinion that it is within the constitutional power of the General Court to levy an excise as a toll for the use of public ways by motor vehicles. * * *

"The proposed bill is a revenue measure. It is not enacted in the exercise of the police power.

* * *

"(6) * * * An examination of the proposed bill plainly shows that it provides for an excise for the use of highways and not a property tax."

*In re Ops.* (Mass.), 250 Mass. 591, 146 N. E. 651. (Decided January, 1925).

We submit that such exactions are "tolls" and compel both non-residents and residents to pay in advance said charges. The Supreme Court has decided that a non-resident must pay said charges, being "tolls," on the ground that said charges are not prohibited by the Commerce Clause, and the defendant cannot argue that said charges are not "tolls," because users, being residents of the State, are not protected by the Commerce Clause, therefore, such charges are not "tolls."

IV.

**The said Motor Vehicle Fuel Laws are unconstitutional as well as the acts of defendant enforcing the same, being contrary to and in violation of the Fourteenth Amendment of the Federal Constitution.**

The appellants and many thousands of persons, firms, associations and corporations, have been and are now compelled to pay in advance 3 cents per gallon of such motor vehicle fuel before they can operate their motor vehicles on any highway, including any street of municipalities, and further every other person, firm, association and corporation must pay in advance said 3 cents, although they do not use any highway or street of municipalities by motor vehicles. The distributors collect said 3 cents per gallon from all the said consumers at the time of purchase. For instance, all of the consumers paid their 3 cents on April 1st, 1928, and said distributors keep and have the benefit of such moneys until they must account to the State Controller, to-wit, on the 14th of August, 1928. It is alleged and admitted that the distributors on August 14th, 1928, paid over to said State Controller about $8,477,293.00, being the amount paid from daily collections during the period from March 31, 1928, to Just 1st, 1928, except the one per cent of such collections kept by the distributors. The distributors collected on July 1st, 1928, and accounts to the State Controller for the next period from July 1st to October 1st, so that said distributors always have the use and benefit of at least $4,000,000.00, without considering the said benefit of one per cent of all collections.

The only distributors are the ones who produce, refine

or distribute said fuel, and there are about 21 distributors in the State who receive this privilege of the use and benefit of said $4,000,000.00 and said one per cent.

(a) *The one per cent is illegal.* The distributors keep one per cent of all monies collected from all consumers. Under the provisions of said State laws, the distributors are entitled to said one per cent only at the time of collection to "cover subsequent losses occasioned by evaporation and handling." (See Appendix, p. 2, f. 6.) In other words, the distributor is granted a privilege to receive money in advance of any loss by evaporation and handling, which may be occasioned in the future, whether or not there has been no loss or handling, and said one per cent comes out of the pockets of all the appellants and said others similarly interested or situated.

(c) *Refunds.* Sec. 11 of said State laws (see Appendix, p. 5, f. 15) provides that any persons, etc., buying such fuel and using the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax, shall be reimbursed and repaid the amount of such tax by the State Controller, and application for such refund shall be filed with the State Controller within twelve months from the date of purchase of said fuel.

The State Controller, the appellee, paid out about $800,000.00, as returns to consumers, being the actual amount of moneys paid to said distributors.

The State Controller never received one per cent of such amount, as said distributors kept it for losses in the future that might be occasioned by evaporation and handling.

The State Controller takes from the moneys he received from the appellants and all persons, firms, associations and corporations similarly interested or situated, the said one per cent.

By such State laws the said appellants and said others are being taxed for the benefit of those who have and will receive such refunds, either distributors or consumers, or both.

(d) *The said exactions cannot be enforced against any person who has not been benefited.*

The appellants and all said others similarly interested or situated have and will be compelled to pay in advance the entire amount collected by said distributors, as tax collectors, though 60% of said amount was collected illegally, as they do not wear out or damage the public highways outside of the limits of municipalities, but wear out and damage the streets thereof and for such use of said streets, the appellants and all said others have and will pay taxes and assessments, in order to maintain, repair, construct or reconstruct said streets, and recover not a cent from such amount collected as aforesaid, has been and will be used to maintain, repair, construct or reconstruct said streets.

The sole purpose, as announced by the California Courts, was to collect a "toll" to reimburse the State for construction and reconstruction, and for maintenance and repairing only those highways outside of the limits of municipalities, so it follows that the State cannot legally enforce said "toll."

This Court had before it a suit involving the distinction between a toll and a tonnage impost. The city of Chicago passed an ordinance requiring boats operating

in the Chicago River to obtain licenses. The only defense presented by the City was that such fees were charged and collected as compensation for benefits conferred in providing an improved public highway, and that said license fees were tolls. This Court cited the cases of *Huse* v. *Glover*, 119 U. S., 54, 30 L. Ed. 487, and *Sands* v. *Manistee River Imp. Co.*, 123 U. S., 288, 31 L. Ed., 149.

In delivering the opinion Mr. Justice Field said:

> "The attempt is made to assimilate the present case to those cases from the fact that it is contended that the Chicago River is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expense of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen, nor can arise to the tugs in question by the alleged deepening of the river."
>
> *Harmon* v. *Chicago*, 147 U. S. 396, 409, 37 L. Ed. 216.

In speaking of a License Act, relating to the 4 per cent gross tax of 1923, Justice Shenk in delivering the opinion of the California Supreme Court said:

> "An examination of the entire statute discloses that the obvious and only purpose of the act was to provide a revenue with which to maintain and repair the public highways of the state outside of incorporated cities, and that such revenue was to be obtained by the imposition of a license or privilege tax on the business of operating motor vehicles for hire over such public highways. The act is not a police measure in any sense. It provides for license tax for revenue purposes only."

Interpreting Section 8, the opinion said:

> "The license taxes here imposed by the Legislature are in furtherance of a state purpose for the maintenance of state highways and to extend aid in the maintenance of county highways."

Interpreting Section 9, relating to exemptions of certain classes of vehicles, the following is found in the opinion:

> "It is apparent that this exemption and the further exemption * * * were intended to apply to those who are engaged in the business of operating motor vehicles for hire within the limits of incorporated cities. As such, they may be properly so separately classified for the reason that highways within the municipality are usually not maintainable directly at the expense of the state but from municipal revenues derived from the exercise of municipal powers of license and taxation, and it must be assumed that the Legislature had this distinction in mind in limiting the license to the use of highways maintainable by the state and for whose maintenance the municipalities are not responsible."
>
> *Baron Service Corp. v. Hunt*, 199 Cal. 21, 248 Pac. 235.

Under the provisions of this Act certain operators deducted from their gross receipts all of the amount of licenses paid by them to cities.

It is admitted that 60 per cent of the whole amount was received by the appellee, State Controller, from the appellants and all others similarly interested or situated, for the use of the streets of municipalities and that no portion of said amount was used in the maintenance, repair, construction or reconstruction of streets in the municipalities, but all such amount was used on highways or roads outside of the limits of the municipalities,

and it follows that the said appellants and said others have been charged said "tolls," although they have paid to said municipalities for the use of said streets, and they have not received any benefits from said "tolls."

(e) *The appellants and all said others are tax payers and are entitled to protection.*

The admitted facts show that the appellants and all said others are taxpayers and under the provisions of said Motor Vehicle Fuel Laws they are forced to pay money for private purposes and to private persons. These motor vehicle fuel laws are not enacted for public purposes.

Mr. Justice Day in delivering the opinion said:

> "The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not give the right to impose taxes for private purposes. Fallbrook Irrigation District v. Bradley, 164 U. S. 155, 17 Sup. Ct. 56, 41 L. Ed., 369. In that case the province of this court in reviewing the power of state taxation was thoroughly discussed by the late Mr. Justice Peckham speaking for the Court. Concluding the discussion of that subject (164 U. S. 158, 17 Sup. Ct. 63, 41 L. Ed. 369), the Justice said:
>
> "In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any than a public use becomes material in this court,

even where the taking is under the authority of the state instead of the federal government."

*Green v. Frazier,* 253 U. S. 233, 64 L. Ed. 878.

To the same effect:

*Deering & Co. v. Peterson,* 75 Minn. 118;
*Conlin v. State,* 114 Cal. 404, 46 Pac. 279;
*Molineux v. State,* 109 Cal. 376, 42 Pac. 34;
*Water Co. v. Wade,* 59 N. J. L. 78;
*Robbins v. Kadyk,* 312 Ill. 290, 143 N. E., 863;
*1 Cooley on Taxation,* Sec. 174;
*Citizens Savings & Loan Ass'n v. Topeka,* 20 Wall 655, 22 L. Ed., 455;
*Lowell v. City of Boston,* 111 Mass. 454.

The Supreme Court had before it the validity of the motor vehicle fuel law of Illinois, and the court held said law unconstitutional, being contrary to and in violation of the due process of law clause of the Fourteenth Amendment as well as the State Constitution.

In the opinion is cited many of the authorities found herein above.

*Chicago Motor Club v. Kinney,* 160 N. E., 163.

We submit that said motor vehicles fuel laws abridge the privileges or immunities of the plaintiffs and all said others, and also deprive them of their life, liberty, or property without due process of law, and also deny them of the equal protection of the law contrary to and in violation of the Fourteenth Amendment of the Federal Constitution.

**The Federal Aid Legislation, prohibiting "tolls of all kinds," was adopted by the State. Such act of the State created a contract under which the public was protected and said Motor Vehicle Fuel Laws are unconstitutional.**

It is admitted that 40% of the revenue received from the state is collected exclusively from said "tolls" for the use of Federal used highways, as all state highways and county roads are within the protection of said Federal aid legislation. Sec. 6 of said *Federal Highway Act* of November 9, 1921, c. 119, 42 Stat. 212, provides:

> "Highways which may receive Federal aid shall be divided into two classes, one of which shall be known as primary or interstate highways, * * * and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, * * *."

It has been shown that where any portion of any state highway or county road has been constructed or reconstructed under Federal aid, then all other remaining portions of said highways or county roads are embraced within the provisions of said Federal aid legislation.

The Federal government has paid out many hundreds of millions of dollars to the states, and the government received such money from the public through taxes, etc., and said public includes these appellants and all others similarly interested or situated.

Prior to the enactment of the "Rural Post Road Act" of 1916, congress had before it the decisions of this Court of what a "toll" was and the attempts of states to take advantage not only of the United States, but also the public.

We cite a few decisions:

This Supreme Court had occasion to interpret the provisions of the laws of Pennsylvania, Ohio and Maryland, relating to the Cumberland Road, and the Acts of Congress transferring such road to the respective States. The defendants in error had contracts for carrying the mail. This Court affirmed the judgment of the Circuit Court and held that the provisions of such contract between the State and the Federal government could not be modified or changed by subsequent acts of the legislature of the State. In the opinion of the Court delivered by Mr. Chief Justice Taney, it is said:

> "Now, as this was well known to the parties, can it be supposed that when Pennsylvania, by her Act of 1831, proposed to take the road, and keep it in repair from the tolls collected upon it, and exempted from the toll carriages laden with the property of the United States, she yet intended to charge it upon the mails? That in return for the large expenditures she required to be made, before she would receive the road, she confined her exemption to matters of no importance, and reserved the right to tax all that was of real value? And when Congress assented to the proposition, and incurred such heavy expenses for repairs, did they mean to leave their mails through Maryland and Pennsylvania still liable to the toll out of which the road was to be kept in repair? Upon this point the Act of Congress of March 3rd, 1835, is entitled to great consideration. For it was under this law that the States finally took possession of the road and proceeded to collect the toll. By so doing they assented to all the provisions contained in this Act of Congress; and one of them is an express condition that the United States should not thereafter be subject to any expense in relation to the road. Yet under the argument, the expenses of the road are to be defrayed out of the tolls collected upon it. And if

the mails in Pennsylvania and Maryland may be charged, it will be found that instead of the entire exception, for which the United States so expressly stipulated, and to which Pennsylvania agreed, a very large proportion of the expenses of repair will be annually thrown upon them. We do not think that either party could have intended, when the contract was made, to burden the United States in this indirect way for the cost of repairs. So far as the general government is concerned, it might as well be paid directly from the treasury. For nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the Post Office Department * * *.

"In either case it is not free from expense in relation to the road, according to the compact upon which it was surrendered to and accepted by the States."

In such case the acts of Pennsylvania charging and collecting certain tolls were held void.

*Searight v. Stokes, et al.,* 3 How. 151, 168, 11 L. Ed. 537, 545.

The State of Ohio endeavored by subsequent legislation to charge tolls on passengers on mail coaches. This Court held such law of Ohio was void, being in contravention of the Acts of Congress and the State of Ohio relating to the surrender and acceptance of the Cumberland Road.

*Neil, Moore & Co. v. Ohio,* 3 How. 721, 11 L. Ed. 800.

Again the State of Maryland endeavored to impose a toll upon all passengers in mail coaches, and if such toll was not paid, a toll of one dollar for each coach was charged whenever such coach passed over the road.

This Court declared such toll was inconsistent with the compact between Maryland and Congress. In such action Achison was the owner and operator of the mail coaches and carried passengers therein.

*Achison v. Huddleson,* 12 How. 294, 13 L. Ed. 993.

Congress granted public lands to the States in aiding the construction of railroads on the condition that such railroads were "public highways for the use of the Government, free from all tolls or other charge for transportation of its property or troops." The question presented to this Court for consideration was whether or not such condition "free from all tolls or other charge for transportation of its property or troops" includes the free use of the road alone, or transportation also. Mr. Justice Bradley, in delivering the opinion of the Court, said:

> "In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; and when Congress, in granting lands in aid of such a road, declared that the same shall be and remain a public highway for the use of the Government of the United States, it only means that the Government shall have the right to use the road, but not that it shall have the right to require its transportation to be performed by the railroad company. And when this right of the use of the road is granted 'free from all toll or other charge for transportation of any property or troops,' it only means, that the Government shall not be subject to any toll for such use of the road."

In the opinion the Court cites a number of Acts of Congress in which the same provisions regarding toll were expressed, and all of such provisions provided for the free use of such highways for the transportation of property or troops free from all toll or other charge.

*Lake Superior, etc., R. R. Co. v. U. S.*, 3 Otto, 442, 23 L. Ed. 965.

In Oregon the Federal Government had donated thousands of acres of public lands for the sole purpose of having constructed a post road from the Pacific Ocean to the Idaho line, with the only restriction, as far as the Government was concerned, freedom from tolls in connection with mails and the movement of troops, yet after some years and after the Government had parted with title to public lands in the State, it found no post road and no benefits derived from such land grant.

*U. S. v. California & Oregon Land Co.*, 148 U. S. 31, 37 L. Ed. 354;
*U. S. v. Dalles Military Road Co.*, 140 U. S. 599, 35 L. Ed. 561.

The following decisions show that the public had been or could be charged exorbitant fees for the use of public highways.

Mr. Justice Bradley delivered the opinion of the Court:

> "Whether, in addition to this, Congress, under the power to establish post roads, * * *, has authority to establish and facilitate the means of communication between the different parts of the country, and thus to counteract the apprehended impediments referred to, is a question which has exercised the profoundest minds of the country. This power was formerly exercised in the construction of the Cumberland road and other similar

works. It has more recently been exercised, though mostly on national territory, in the establishment of railroad communication with the Pacific coast. But it is to be hoped that no occasion will ever arise to call for any general exercise of such a power, if it exists."

In such case the Court had for consideration the question of whether or not the PUBLIC had no remedy against exorbitant tolls. The Court also held that the State itself could build such highway and could assess a passenger whatever toll it desired unchallenged, and such rights of the State, to charge toll on its roads and canals, arises from its ownership thereof. "It gives them being. It has a right to exact compensation for their use. * * * The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it."

*Balt. & Ohio R. R. Co. vs. Maryland,* 21 Wall. 456, 475, 22 L. Ed. 678, 684.

In speaking of the charge for wharfage, which had to be borne by the public, this Court declared that it had no jurisdiction to regulate such matters, even if the charges for the use of the wharves were exorbitant. In the opinion of the Supreme Court, delivered by Mr. Justice Blatchford, it is said:

"If the state laws furnish no remedy (in other words, if the charges are sanctioned by them), then, as before stated, it is for Congress, and not the United States Courts to regulate the matter, and provide a proper remedy. Such an interposition may become necessary; for although the imposition of unreasonable wharfage by a City or a State is

always the dictate of a suicidal policy, the temptation of immediate advantage under stringent pressure will often lead to its adoption."

*Ouachita, etc., Packet Co. v. Aiken,* 221 U. S. 444, 449, 30 L. Ed. 976, 978.

The State of Michigan, in 1852, enacted a law and adopted all the conditions expressed in such Federal Act. The Federal Government took over such canal and demanded an accounting from the State of certain properties, including about sixty-eight thousand dollars, which the State had collected as toll and had on hand. Mr. Justice Peckham, in delivering the opinion of the Court, said:

"Evidently, it was not supposed that the state was to profit from this grant further than such profit as might arise indirectly from the completion and operation of the canal.

"Defendant refers to certain grants of land made to Illinois, Indiana and Ohio, and perhaps to some of the other states, where such grants were made to aid in the construction of canals in those states, and where possible profits from the construction of such canals were within the contemplation of the various grants. But in the acts referred to there are no restrictions upon the tolls which the states may charge for the use of their respective canals, the only limitation imposed being that the government should have their free use for the passing of its vessels; while, in this act, the tolls which the state may charge are to be only such after the payment for its construction, etc., as should be sufficient to pay the necessary expenses for the care, charge and the repairs thereof."

*United States v. Michigan,* 190 U. S. 379, 399, 400, 47 L. Ed. 1403, 1110, 1111.

The above citations show that Congress enacted said Act of 1916 to protect the public against any "toll" of

any kind, and these appellants and said all others, using said Federal aid highways by their motor vehicles, are the public, who are to be protected against any "toll" to be charged against their said use. If not, why did Congress simply provide that all highways constructed or reconstructed under said Federal Act should be "free from all toll or other charge for transportation of any property or troops"? Because the public is to enjoy the free use of said highways without any "toll".

As was said by Mr. Justice Bradley in *Ouachita, etc., Packet Co. v. Aiken*, supra, "It is for Congress * * *to regulate the matter, and provide a proper remedy." So Congress regulated the use of Federal aided highways and provided the remedy, to-wit, the prohibition against "tolls of all kinds" for the use of said Federal aided highways.

The legislature in 1925 referred to the people to raise the charge of 2 cents per gallon under said law of 1923, to 3 cents per gallon, and the people in November, 1926, voted not to raise such additional one cent per gallon. In the face of such vote, the legislature passed said law, Chap. 795, *Laws of 1927*, and the people, using the highways by motor vehicles, are paying 3 cents per gallon of said motor vehicle fuel.

During the year 1928, the State has received more than $32,000,000.00 from such exactions, "tolls," and it is admitted that $12,800,000.00 thereof was received from the use of Federal aid highways, and the balance, $19,200,000.00, was collected from the use of streets within the limits of municipalities.

In addition the State collected at least $10,000,000.00 from registration fees and licenses. Congress never in-

tended that the State should make a profit out of the money paid to it by said Federal aid legislation.

Every dollar of said $42,000,000.00 is expended on Federal aid highways and not on the streets of municipalities.

It is shown that the State is increasing the cost of using said Federal aided highways, by increasing the charge of motor vehicle fuel and licenses. Congress never intended to receive back one dollar from the millions and millions of dollars which have been and are now being appropriated for the benefit of the public. The Acts of Congress have shown, as set out in this brief, that it has been and is now its desire to do away with and abolish "tolls of all kinds" for the use of internal improvements. The States are acting in the construction of such Federal aided highways as trustees for the public, and of the Federal Government, and the public are entitled to receive the benefits of the use of such Federal aided highways without paying to the States any charges for such use.

It is preposterous to claim that the States can reimburse themselves for their share in the construction of said Federal aided highways, and in such manner recover back not only their share, but also in the future to receive a profit on such construction.

The said motor vehicle fuel laws are unconstitutional, being contrary to and in violation of the said Federal aid legislation, adopted by the State, and the contract made by the State with the United States for the benefit of the public, and also such laws are unconstitutional, being contrary to and in violation of the due process clause of the Fourteenth Amendment.

*Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714;
*Western U. Tel. Co. v. Andrews*, 216 U. S. 165, 54 L. Ed. 430;
*Home Tel. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 57 L. Ed. 510;
*Looney v. Crane*, 245 U. S. 178, 62 L. Ed. 230;
*Chicago Gt. Western R. Co. v. Kendall*, 266 U. S. 94, 69 L. Ed. 188.

VI.

**The provisions of said State Laws are unconstitutional and void, being contrary to and in violation of the Constitution of the State of California.** (Appendix, p. 11, l. 23.)

We call the attention to this Court that the Supreme Court of California has in an opinion delivered by Justice Seawell, said:

> "The rule contended for by appellants that all tax legislation must be construed most strictly against the state and most favorable to the taxpayers must be conceded."
>
> *Riley v. Havens*, 193 Cal. 423.

The titles of said state laws do not disclose the sole subject or purpose thereof. The titles are to regulate and license a business, while the sole subject was to collect a revenue from all consumers of motor vehicle fuel, and then to refund all the amounts from those consumers who do not use the highways by motor vehicles or were exempted. (Appendix, p. 12, l. 24.)

Also said refunds were paid out in violation of Art. IV, Sec. 25. (Appendix, p. 12, l. 35.)

Also said refunds were paid out in violation of Art. IV, Sec. 22 and Sec. 31, as the object also was to benefit

private persons, and not for public purposes. (Appendix, p. 11, f. 33.)

> "To promote a public purpose by a tax levy upon the property in this State, is within the power of the legislature; but the legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote or collateral way. Legislative power of taxation is not illimitable. It can be used only in aid of a public object—an object which is within the purpose for which governments are established. In the vigorous language of the Supreme Court of Pennsylvania, 'the legislature has no constitutional right to levy a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder.'"
>
> *Sharpless v. Mayor, etc.*, 21 Penn. 168.

At the least, then, two heterogeneous subjects are embraced in the act, one of which is not expressed in the title, and they cannot be segregated. The title does not express the objects of legislation embodied in the provisions of the act. It is, therefore, narrower than the body of the act, and fails to impart that notice of the measures enacted, which the Constitution requires. To prohibit such legislation was the sole end and aim of the constitutional requirement. "The practice" says the Supreme Court of Missouri, "of comprising in one bill subjects of a diverse and antagonistic nature, in order to combine in its support members who were in favor of

particular measures, but neither of which could command the requisite majority on its own merits, was found to be not a corruptive influence in the Legislature itself, but destructive of the best interests of the State. But this was not more detrimental than that other pernicious practice, by which, through dexterous and unscrupulous management, designing men inserted clauses in the bodies of bills, of the true meaning of which the title gave no indication, and by skillful maneuvering urged them on to their passage. These things led to fraud and injury, and it was found necessary to apply a corrective in the shape of a constitutional provision." *(City of St. Louis v. Tiefel,* 42. Mo. 590.) This provision has been framed in the constitutions of many of the States of the Union; and Courts, whenever it has come before them, have liberally construed it as the will of the people in the interests of honest legislation.

*People v. Parks,* 58 Cal. 624, 639, 640.

We also refer to the facts, arguments and citations found in paragraph IV in support of our position in this paragraph.

In addition (see appendix, p. 10, f. 29) the legislature well knew that said motor vehicle fuel laws were unconstitutional, as in Sec. (d) of 77 of the "Motor Vehicle Act" of 1923, as amended in 1927, it declared, in case the Courts decide said fuel laws are held unconstitutional, then the fees in (a) and (c) of the said Sec. 77, shall be increased so as to make up the loss of such revenue.

VII.

**The acts of Appellee enforcing said State Laws were performed under color of his office, and such acts are void and illegal, and the Appellants were entitled to a temporary injunction.**

It is admitted that said appellee is forcing all consumers to pay such 3 cents per gallon and such collections amount to many thousands of dollars daily, and he is paying out many thousands of dollars as refunds, and permit the distributors to have the use of at least said $4,000,00.00, as well as said one per cent.

The appellants and said others similarly interested or situated have been and are daily suffering irreparable loss and damage.

We refer to the above paragraphs of our brief, in which the facts, arguments and citations are set out therein, showing our position.

VIII.

**The action of the Lower Court, in granting the motion to dismiss the bill of complaint, is erroneous, and refusing the oral request that the Court file a written opinion.**

We have already stated our position and we refer to the above paragraphs of our brief, in which the facts, arguments and citations are set out therein, except the refusal to file a written opinion. The motion to dismiss contained six grounds (see R. 14, 15.)

The appellants do not know what grounds the lower court based its order on, and they could not present an amendment.

We submit that the parties, as well as this Court, are entitled to a written opinion, so as to advise them upon what grounds such motion to dismiss had been granted.

**In Conclusion.**

We submit that this Court should reverse the order denying said motion for an interlocutory injunction and granting the said motion to dismiss, and it should direct the lower court, consisting of three same judges, to issue a permanent injunction against said appellee as prayed in the bill of complaint, and decree that said motor vehicle fuel laws be declared unconstitutional and void, and said appellee be directed and commanded to pay into the registry of the Court all moneys which he has received since March 31, 1928, and for such allowances, distributions and payments as may be hereafter determined, awarded and decreed, and for all other proper and further relief in the premises.

Respectfully submitted,

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